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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1237

ROBERT L. GALLINARO
and
ROBERT BOHIGIAN,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

FRANCIS J. DIMENTO
JAMES J. SULLIVAN
DIMENTO & SULLIVAN
100 State Street
Boston, Massachusetts 02109

THOMAS C. CAMERON
of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

The petitioners Robert L. Gallinaro and Robert Bohigian pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts, entered in the above-entitled cases on December 30, 1971.

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts is reported as 1971 Massachusetts Advance Sheets, page 1921, and is annexed hereto as Appendix "A".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(3). The judgment of the Supreme Judicial Court was entered on December 30, 1971, affirming judgments of conviction of the petitioners in the Superior Court, pursuant to which the petitioners were awarded, on March 12, 1971, sentences of fines and imprisonment.

Question Presented

Where a warrant to search certain premises is granted pursuant to an affidavit based on surveillances of those premises, and the affidavit contains deliberate misrepresentations which establish that the surveillances occurred, if at all, at some remote time, is the victim of the search entitled, under the Fourth Amendment to the Constitution of the United States, to have the fruits of the search suppressed as evidence against him?

Constitutional and Other Provisions Involved

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES — SEARCHES AND SEIZURE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

A. *The Proceedings Below*

This is a petition seeking review of a judgment of the Supreme Judicial Court of Massachusetts affirming judg-

ments of conviction of the Superior Court of Massachusetts.

On July 8, 1970, six indictments for violations of the state wagering laws were returned against each petitioner. Motions to Suppress evidence seized in a raid occurring June 13, 1970, based on violation of the petitioner' rights under the Fourth Amendment, were filed on July 28, 1970. The Motions to Suppress were, after hearing on March 9 and 10, 1971, denied over petitioners' exceptions, and introduction of the evidence sought to be suppressed resulted in the conviction of each petitioner on five of the indictments. The trial court's Findings and Rulings on Motion to Suppress is annexed hereto as Appendix "B".

The petitioners filed their Claims of Appeal on March 31, 1971, and their Assignments of Error on June 14, 1971. One of the errors assigned, and later argued, was that denial of the petitioners' Motions to Suppress constituted Federal Constitutional error. The Supreme Judicial Court affirmed the judgments of conviction by rescript opinion dated December 30, 1971.

B. *The Facts*

The petitioners were convicted of various gambling offenses solely on evidence obtained in a raid conducted by police officers on June 13, 1970, pursuant to a search warrant.

The affidavit in support of that warrant consists almost entirely of reports of surveillances of 241 Foster Street and of calls made to telephone on those premises during the course of the surveillanees.

The affiant, Trooper Martin J. Headd, of the State Police, claimed under oath to have observed, parked outside the premises, on May 6, 1970, a Cadillac bearing Massachusetts Registration N92-279, which a check with the Registry of Motor Vehicles showed to be registered to Richard

Brown, 330 Lincoln Street, Waltham, Massachusetts. However, uncontradicted testimony established that Brown had traded his 1967 Cadillac to Allen Buick Company toward a 1970 Buick on April 24, 1970, and had had the registration plate, number N92-279, transferred to the Buick which he drove thereafter. Therefore, it was impossible for the Trooper to have seen a Cadillac bearing that registration on May 5, 1970, or at any time after April 24.

Trooper Headd also claimed in the affidavit to have checked with the Registry of Motor Vehicles another Cadillac observed outside the premises on May 6, 1971, bearing Massachusetts Registration 416-40Z, and that the Registry check showed the vehicle to be registered to one Robert Gallinaro, 29 Lawndale Street, Belmont. Headd therefore concluded that the operator of the vehicle was the appellant Robert Gallinaro and, by pre-arrangement with another officer, the latter, on June 9, 1971, telephoned the premises, asking for "Bob", immediately after Headd informed him that Gallinaro had just left. Under the plan, the other officer, having "just missed Bob", would then ask for racing information. In fact, the Registry's records showed that the Cadillac bearing Registration 416-40Z was not registered to Robert Gallinaro but to *Elizabeth* Gallinaro, so that the trooper could not have obtained the knowledge that its operator was named "Bob" from the Registry of Motor Vehicles as he claimed.

Furthermore, the trooper testified that the telephone call of June 9 to the premises by his fellow officer, in the course of which accurate racing information was obtained, assumed that a request to speak to "Bob" would result in a reply that "Bob" had just left (the trooper having just observed the appellant Robert Gallinaro leaving the premises). However, the affidavit shows that, at that time, a vehicle was parked outside which he knew to be registered to Rose Bohigian. Since the defendant *Robert* Bohigian had already been connected to the premises by virtue of

an observation of his automobile parked outside on May 7, 1970, the likelihood was that Robert Bohigian was the operator of the parked automobile and was still on the premises. Therefore, the caller could hardly have expected a negative reply to his inquiry for "Bob", after only one of the two possible "Bobs" had left the premises.

Reasons for Granting the Writ

THE COURT BELOW, BY SANCTIONING DELIBERATE MISREPRESENTATIONS IN THE AFFIDAVIT, TAKES AWAY THE MAGISTRATE'S FUNCTION IN THE ISSUANCE OF A SEARCH WARRANT AND LEAVES TO THE AFFIANT THE DETERMINATION OF PROBABLE CAUSE.

The Judge who, satisfied with the officer's affidavit, issued the search warrant in the instant case, was obviously duped. When the misrepresentations of the affiant are exposed, the conclusion becomes inescapable that the surveillances never took place, at least not on the dates alleged in the affidavit.[1] That Brown actually owned a Cadillac bearing the described registration plate prior to the beginning of the alleged surveillances and that the subject operating the motor vehicle registered to *Elizabeth* Gallinaro was in fact named Robert, are highly significant and cannot be explained away as coincidences. The prosecution offered no evidence on the Motions to Suppress and left the discrepancies in the affidavit wholly unexplained.

By inserting lies into his affidavit, the officer guaranteed that it would reflect ample probable cause to search, and

[1] The petitioners suggest that the officer had the premises under surveillance prior to May 5, 1970, when Brown still drove his Cadillac, and that the officer up-dated the record of his prior surveillance in order to bring his affidavit within the requirements of *Sgro* v. *United States*, 287 U.S. 206, 210 (1932) ("proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time").

thus guaranteed the issuance of the warrant. The issuing magistrate, rather than serving as a neutral and detached judge of probable cause, *Johnson* v. *United States*, 333 U.S. 10 (1948), was nothing but a foil for the affiant.

This Court has assumed, without deciding, that deliberate misrepresentations would vitiate a search warrant. *Rugendorf* v. *United States*, 376 U.S. 528 (1964). The Court of Appeals for the Seventh Circuit has affirmatively decided the point,[2] and the Second Circuit has indicated its agreement.[3]

An analogous problem arose in *King* v. *United States*, 282 F.2d 398 (4th Cir. 1960), where a search warrant was based on the affidavit of a person claiming a spurious identity. The court noted that the statutory mandate that the affiant's name *shall* be stated is not satisfied by a false name, given by an unknown individual, and refused to uphold the search warrant on that ground. *Id.* at 399-400.

This Court, as noted above, has indicated in *Rugendorf*, *supra*, that it would, if faced with deliberate misrepresentations in an affidavit in support of a search warrant, follow the *Pearce* rule. It is submitted that the Fourth Amendment requires no less.[4]

The Fourth Amendment requires that the existence of probable cause be determined by a neutral and detached magistrate instead of being judged by government agents. *Johnson* v. *United States*, 333 U.S. 10 (1948). Since the

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[2] *United States* v. *Pearce*, 275 F.2d 318 (7th Cir. 1960); *United States* v. *Roth*, 391 F.2d 507 (7th Cir. 1967).

[3] *United States* v. *Suarez*, 380 F.2d 713, 716 (2d Cir. 1967); *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967).

[4] *Sgro* v. *United States*, 287 U.S. 206 (1932). "The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." *Id.* at 210. See also *Grau* v. *United States*, 287 U.S. 124, 128 (1932), and *Baysden* v. *United States*, 271 F.2d 325, 327 (4th Cir. 1959).

application for a search warrant is *ex parte* in nature, the magistrate's only check on the affiant's veracity is a search for internal inconsistency.[5] The officer who, on application for a search warrant, takes advantage of the absence of confrontation by inserting untruths into the affidavit usurps the magistrate's function no less than the officer who simply conducts a search without bothering to obtain a warrant. *McCray* v. *Illinois*, 386 U.S. 300, 315 (1967).

An affidavit in support of a search warrant must be signed, sworn to, and contain sufficient facts to enable the magistrate to determine that probable cause exists. The absence of an oath is fatal to an affidavit,[6] as is the absence of the affiant's name.[7] Just as the requirement that the name of the affiant appear cannot be satisfied by the insertion of a false name, *King* v. *United States, supra*, it must follow that the requirement that *facts* be submitted to the magistrate cannot be satisfied by untruths. No authority can be required for the proposition that untruths are not facts.

This Court has shown no reluctance to vitiate a warrant supported by an affidavit containing insufficient facts.

"There is an equal invasion of private rights whether the warrant is issued on the basis of perjured information or whether it is issued without sufficient facts being set forth in an affidavit. Both situations should give rise to a finding of no probable cause, for it would make little sense to say that a set of truthful facts plus some perjured facts would equal probable cause, while the truthful facts by themselves would be insufficient." 51 Cornell Law Quarterly, 822 — Case Note re: *People* v. *Alfinito*, 16 N.Y. 2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965), at 825.

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[5] Kipperman: *Inaccurate Search Warrant Affidavits As A Ground For Suppressing Evidence*, 84 Harvard Law Review 825, 830 (1971).

[6] *State* v. *Licari*, 153 Conn. 127, 132-133, 214 A. 2d 900, 902-903 (1965).

[7] *United States* v. *Kaplan*, 286 F. 963 (D.C. S.D. Ga. 1923); *Howard* v. *State*, 199 Md. 529, 87 A. 2d 161 (1952).

The knowing use of perjured statements in an affidavit for a search warrant is no less invidious than the knowing use of perjured testimony at trial, particularly where, as here, the convictions rest entirely on evidence seized pursuant to the warrant. It would seem to follow, therefore, that a conviction based on such evidence may no more stand than one based on perjured testimony. *Napue* v. *Illinois*, 360 U.S. 264 (1959).

The arguments for the exclusionary rule with respect to evidence obtained by means of coerced confessions or unreasonable searches apply with equal force when the search is based upon an untruthful affidavit.[8]

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[8] "Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained . . . Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. A new trial is necessitated, and by reason of the exclusion of evidence derived from the unfair aspects of the prior prosecution a guilty defendant may escape. But the people can avoid such miscarriages of justice. A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors. 'Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.'" *Irvine* v. *California*, 347 U.S. 128, 148-149 (1954). Dissent of Mr. Justice Frankfurter.

"Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold . . . However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods of law enforcement impairs its enduring effectiveness . . . Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead* v. *United States*, 1928, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L. Ed. 944: 'Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people

Finally, the possibility that an untruthful affiant may himself be prosecuted for his perjury is not a sufficient sanction. The futility of such "other remedies" is fully recognized in both *Mapp* v. *Ohio*, 367 U.S. 643 (1961)[9] and *Irvine* v. *California*, 347 U.S. 128 (1954).[10]

It is true that the trial court found as fact that the errors contained in the affidavit were inadvertencies, not indicative of lack of good faith, and inconsequential on matters which were not the only basis of probable cause (Appendix "B"), and the Supreme Judicial Court, without stating the evidence, found the trial court's findings and conclusions were well warranted. (Appendix "A"). It is the law, however, that a Constitutional question is not rendered immune to review by unwarranted findings of fact.[11] As noted above, the misrepresentations in the affidavit were conclusively established by the uncontradicted documentary evidence furnished by the Registry of Motor Vehicles, Allen Buick Company, and the witness Brown. When the prosecution chose to offer no explanatory evidence, the trial court elected to base its conclusions on pure speculation.

The state courts should not be permitted, by the device of comprehensive and unsupported "findings of fact", to avoid the receney requirement of *Sgro* v. *United States*, 287 U.S. 206 (1932). (See fn. 1, p. 5, *supra*.)

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by its example. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'" *Mapp* v. *Ohio*, 367 U.S. 643, 657-659 (1961).

[9] *Id.* at 651-652.

[10] *Id.* at 137.

[11] *Napue* v. *Illinois*, 360 U.S. 264 (1959);

In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded. *Id.* at 272. See also *Cassell* v. *Texas*, 339 U.S. 282, 283 (1950); *Pierre* v. *Louisiana*, 306 U.S. 354, 358 (1939).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS J. DIMENTO
JAMES J. SULLIVAN, JR.
DIMENTO & SULLIVAN
100 State Street
Boston, Massachusetts 02109
Attorneys for the Petitioners

THOMAS C. CAMERON
of Counsel

APPENDIX "A"

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

December 30, 1971.

IN THE CASE OF

COMMONWEALTH

v.

ROBERT L. GALLINARO
(and nine companion cases)

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Judgments affirmed.

BY THE COURT,
FREDERICK J. QUINLAN, Clerk.

December 30, 1971.

Brief statement of the grounds and reasons of the decision:

The defendants, after trial before a judge sitting without a jury, were convicted of various gaming offences. Their appeals are before us under G.L. c. 278, §§ 33A-33G. The judge denied motions to suppress evidence taken under a search warrant issued by another Superior Court judge upon the basis of an affidavit submitted by a State police officer. The affidavit reported extended surveillance of premises in Brighton and of telephone calls to those premises. The defendants contend that errors in setting out motor vehicle registration numbers and descriptions of vehicles cast such doubt on the truth of the affidavit as to indicate that it was intentionally false and that, in fact, no surveillance took place on the dates mentioned. After hearing largely oral evidence, the judge found "that the errors ... were not false representations but inadvertences unrelated

. . . to an intention to deceive." He in effect inferred that the errors may have been caused by "erroneous information furnished by the Registry of Motor Vehicles," or by "an inconsequential error of observation." He concluded (1) that the errors were insignificant, (2) that the evidence did not demonstrate the affidavit was not "in good faith," and (3) that it was "based on facts sufficient . . . to establish probable cause." Our review of the evidence, which need not be stated here, shows that his findings and conclusions were well warranted. See *Commonwealth* v. *Murray,* Mass. , — .[a] There was no need to furnish the defendants a transcript of the State police officer's grand jury testimony. It was examined by the judge and marked for identification. That transcript has also been examined here. Compare *Commonwealth* v. *De Christoforo,* Mass. , — , fn. 2,[b] where the disputed grand jury minutes were not marked for identification. Other assignments of error are not argued. See S.J.C. Rule 1:13, 351 Mass. 738.

Judgments affirmed.

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[a] Mass. Adv. Sh. (1971) 887, 892-893.

[b] Mass. Adv. Sh. (1971) 1707, 1710-1711, fn. 2.

APPENDIX "B"

FINDINGS & RULINGS ON MOTION TO SUPPRESS

I find that the errors contained in the Affidavit were not false representations but inadvertencies unrelated in any way to an intention to deceive.

The language in the Affidavit, under date of May 6, 1970, to the effect that "both vehicles being Cadillac Sedans," follows the information furnished by the Registry of Motor Vehicles and, hence, the inference can properly be drawn that the description of the Cadillacs was erroneous information furnished by the Registry of Motor Vehicles.

No proof of substance has been furnished that the observation by the Officer thereafter of the cars as a Cadillac was anything but an inconsequential error of observation, possibly influenced in part by the original error.

With respect to identification of the Gallinaro car as being that of Robert Gallinaro, whereas it was registered to his wife, or some other female, Elizabeth Gallinaro, this does not in and of itself indicate lack of good faith.

I find the errors were inconsequential on matters which were not the only basis of probable cause of illegal gambling on the premises and were not made to induce the Magistrate to issue the search warrant, nor has there been any evidence before me that in fact the Magistrate was deceived to grant the search warrant.

I find there was insufficient evidence to demonstrate the Affidavits were not made in good faith.

I further find the Affidavit was based on facts sufficient as a matter of law to establish probable cause. And I further find that the premises authorized to be searched did not exceed the showing of probable cause.

The Defendants' Motions to Suppress are denied.

(s) DAVID A. ROSE

March 12, 1971—Filed Justice of the Superior Court